Date: August 28, 1995
Case No.: 95-TLC-27

In the Matter of:

WESTERN RANGE ASSOCIATION,
Employer.

Appearances:

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Before: John M. Vittone
Acting Chief Administrative Law Judge

DECISION AND ORDER

This case arises under the provisions of section 218 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1188, and the implementing regulations set forth at 20 C.F.R. §§ 655.90 - 655.113. The Employer has requested administrative review pursuant to 20 C.F.R. § 655.112(a).

Statement of the case

The Western Range Association ("WRA") is a non-profit corporation comprised of farmers who raise sheep in the Western United States. The WRA's principal function is to assist its members in securing an adequate supply of sheepherders. In furtherance of this purpose the WRA acts as a joint employer with its members and submits applications to the Department of Labor ("DOL") for authorization to temporarily import alien sheepherder into the United States based on a demonstrated unavailability of qualified domestic sheepherder.

The temporary alien agricultural labor certification ("H-2A") program arises under the INA, 8 U.S.C. § 1101 *et seq.* as amended by the Immigration Reform and Control Act 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c) and 1188 and 20 C.F.R. § 655.90-113. Authorization to temporarily import alien sheepherder will be granted if:

(A) There are not sufficient [domestic] workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the temporary and seasonal agricultural labor or services involved in the petition; and

(B) the employment of the [H-2A] workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188, 20 C.F.R. 655.90(b).

According to the regulations, to guard against adverse effects on the wages and working conditions of domestic sheepherders, employers are required to pay the temporary foreign sheepherders at least the adverse effect wage rate ("AEWR"), the prevailing wage, or the federal or state minimum wage rate, whichever is higher. 20 C.F.R. § 655.100(b)(9). Additionally, the employer in this case is required to provide free housing and meals to the sheepherder.[1]

The California State Employment Security Agency determined the prevailing wage for the State of California for 1995-1996 to be $700.00 per month. This figure was based on the prevailing wage survey conducted by the Agency. On July 17, 1995, DOL set the 1995-1996 wage rates for sheepherder and goatherders, effective July 1, 1995 at $800. To arrive at this figure, DOL applied the "51 percent rule"[2] outline in the DOL ETA handbook No. 385 used to

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[1] Pursuant to 20 C.F.R. § 655.93, applications for temporary alien sheepherder are governed by special procedures because the expressly acknowledged unique characteristics of sheepherding requires:

> . . . spending extended periods of time grazing herds of sheep in isolated mountainous terrain; being on call to protect flocks from predators 24 hours a day, 7 days a week . . .

DOL field Memorandum No. 74-89 Part I.B.1. Sheepherders spend extended periods of time without access to permanent housing or food facilities. Accordingly, the employer is also required to provide housing (20 C.F.R. § 655.102(b)(1)) and meals (DOL Field Memorandum No.74-89 at Part I.B.7).

[2] According to the 51 percent rule, if no single wage rate accounts for 40 percent or more of the workers, and the rates are all in the same unit of payment (eg. per hour, per lb.), the wage rates are to be arrayed in descending order. Then beginning with the lowest wage rate at the bottom of the array, the number of domestic workers are to be counted and cumulated until the number counted reaches 51% of the total domestic workers in the survey. The wage rate for last worker(s) to be counted after reaching 51 percent (or slightly higher to amount to a full person) becomes the prevailing rate.

determine the AEWR. The California survey included 34 domestic sheepherder as charted below:

RATE (amount per unit)	No. of U.S. Workers
$1000 per month incl. meals and housing	3
$950 per month incl. meals	1
$875 per month incl. housing	1
$850 per month incl. meals and housing	4
$800 per month incl. meals and housing	7
$800 per month	1
$750 per month incl. meals and housing	1
$700 per month incl. meals and housing	11
$650 per month incl. meals and housing	2
$600 per month incl. meals and housing	2
$550 per month incl. meals and housing	1

The DOL, following the "51 percent rule," started from the lowest monthly wage in the above survey, without regard to whether the wage rate included meals and or housing, and moving up the wage scale, determined that the wage rate covering at least 51 percent of the domestic workers was $800 per month. In other words, 51 percent of 34 domestic workers is 18 (rounded up to make full persons from 17.34). Counting from the bottom of the array, beginning with the worker making $550 per month including meals and housing, it is not until one reaches the workers making $800 per month that 51 percent of the workers in the survey (or 18) are included.

The WRA does not argue that the 51 percent rule does not apply. Rather, WRA argues that the workers whose wage rate included meals and housing should not have been arrayed with workers whose wage rate did not include meals and or housing since the two methods of payment are fundamentally different and not comparable for purposes of determining the AEWR. The WRA's array developed from the survey would be as follows:

RATE (amount per unit)	No. of U.S. Workers
$1000 per month incl. meals and housing	3
$850 per month incl. meals and housing	4
$800 per month incl. meals and housing	7
$750 per month incl. meals and housing	1
$700 per month incl. meals and housing	11
$650 per month incl. meals and housing	2
$600 per month incl. meals and housing	2
$550 per month incl. meals and housing	1

Now applying the 51 percent rule, the AEWR becomes $700 per month including meals and housing. Applying the rule, 51 percent of 31 domestic workers equals 16 workers (rounded up from 15.81 to make whole persons). Beginning with the one worker making $550 per month and counting all workers up the wage scale until reaching at least 16 workers, the last workers counted were making $700 per month including meals and housing. Accordingly, using the WRA's method, $700 per month including meals and housing would be the AEWR. This is the same method used by the California Agency.

Beginning on July 19, 1995, WRA submitted 34 applications for temporary alien agricultural labor certifications on behalf of its members, for alien workers to engage in sheepherding. The WRA offered a wage rate of $700 per month including meals and housing. On July 28, 1995, the Certifying Officer rejected WRA's application for failure to offer the prevailing wage of $800 per month. The WRA disputes the prevailing wage finding and refuses to conform its wage offer to the rate determined by DOL. On August 4, 1995, WRA filed a request for expedited judicial review pursuant to 20 C.F.R. § 655.112.

Collateral estoppel/issue preclusion

As a preliminary matter, WRA has argued that DOL is estopped from litigating this case. Earlier this year, Administrative Law Judge Paul A. Mapes rendered a decision in *Western Range Association*, 95-TLC-4 and 5 (ALJ Mar. 17, 1995). In that case, the Western Range Association and several sheep farmers from Idaho requested an administrative review pursuant to 20 C.F.R. § 655.112(a) in a matter involving a prevailing wage dispute almost identical to the one at issue in the case *sub judice* -- the legal propriety of including the wages of sheepherders who do not receive board as part of their compensation in the survey of Idaho sheepherders. Judge Mapes concluded that the Department's method of calculating the prevailing wage was inaccurate and

improper, and ordered the granting of temporary alien labor certification. Judge Mapes, however, observed that his decision was based on "the circumstances presented in th[at] case." Slip op. at 4.

Issue preclusion or collateral estoppel can be applied in administrative proceedings if (1) the prior litigation involved the same parties and similar facts, (2) the agency came to its decision acting in its judicial capacity, and (3) both parties were afforded a full and fair opportunity to litigate the issue. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). Administrative procedures such as de novo review, opportunity to cross-examine witnesses, present documentary evidence and fully present the parties arguments, are the hallmark of administrative adjudication that may result in issue preclusion. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479-85 & n. 24, *reh'g denied*, 458 U.S. 1113 (1982). Collateral estoppel is a discretionary judicially developed doctrine that is determined on a case-by-case basis. *United States v. Mendoza*, 464 U.S. 154, 158 (1984).

Sufficient factors to impose issue preclusion in this matter based on Judge Mapes' earlier decision are not present. First, although two parties in this matter were involved in the earlier case, none of the sheep ranchers in this case were. Moreover, although the facts were similar, they are not identical. For example, a different wage survey was involved, and the instant proceeding involves both housing and board. In the case heard by Judge Mapes, a settlement involving a supplemental survey was present. It is also significant that Judge Mapes stated that his decision was based on the circumstances presented, thereby recognizing that his decision was fact-specific. Second, Judge Mapes' decision was rendered under the expedited review procedure of 20 C.F.R. § 655.112(a), which does not permit full de novo review or an opportunity to cross examine witnesses or to present additional documentary evidence.[3] When the employer in a temporary agricultural employment proceeding requests expedited review under section 655.112(a), it gains the benefit of a quick decision, but thereby deprives the agency of the opportunity to request a full evidentiary hearing as provided for at section 655.112(b). The potential disadvantage in litigation before the administrative law judge for the agency in this respect suggests strongly that to impose issue preclusion on the agency would be unwarranted in regard to most cases decided under 655.112(a).[4]

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[3] Given the extended briefing schedule in the case before Judge Mapes, I have not considered the expedited regulatory hearing procedure as an important factor in determining whether to impose issue preclusion in this case. It is observed, however, that extremely expedited administrative proceedings imply that the administrative law judge would not be able to give difficult issues such as those presented in this matter the due consideration that could be given in a case that evolved at a less frenzied pace.

[4] Judge Mapes' decision was also a single judge decision rather than a decision by a three-member panel of judges assigned to the Board of Alien Labor Certifications Appeals decision as permitted under the regulation. Although a single judge decision may be quite persuasive, the existence of an opportunity for a BALCA three-judge panel review suggests that a panel decision might be more likely to result in issue preclusion. The record does not reveal

(continued...)

Accordingly, I have declined to invoke the doctrine of issue preclusion in this matter, and have fully considered the Department's arguments and evidence in rendering my decision. It should be noted, however, that declining to invoke issue preclusion is not the same as declining to recognize a prior decision as a precedent. Judge Mapes decision is entitled to some deference as a prior administrative decision, and I have found it to be a well-reasoned and persuasive prior authority.[5]

Analysis

The issue to be decided is whether the Certifying Officer's method of determining the adverse effect wage rate (AEWR) accomplishes the fundamental goal of the regulations to determine what is the "minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected." (20 C.F.R. § 655.0(a)(2)), in cases where DOL determines the AEWR to be applied to employers who are required by law to provide meals and housing without charge to their sheepherders. In other words, in addressing the issue of "adverse effects" under factual conditions as presented in this case, may DOL ignore all factors except what the regulations narrowly define as wages. I hold that DOL must take into consideration other variables.

According to 8 U.S.C. § 1188, 20 C.F.R. 655.90(b)(B), before alien labor may be imported into the United States, it must be determined that (*inter alia*)

> the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

To comply with this mandate the DOL requires employers to pay the temporary foreign sheepherder at least the adverse effect wage rate ("AEWR"), the prevailing wage, or the federal or state minimum wage rate, whichever is higher. 20 C.F.R. § 655.100(b)(9). According to the regulations, the adverse effect wage rate means

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[4](...continued)
whether the employers in the earlier proceeding asked for BALCA panel review.

[5] Prior to the establishment of the Board of Alien Labor Certification Appeals in 1987, appeals from denials of permanent alien labor certifications were decided by individual Department administrative law judges. The central purpose for establishing BALCA was to provide "uniformity and consistency of decision" that was lacking when individual judges decided the cases. 52 Fed. Reg. 12217 (1987). Thus, as a historical matter, individual ALJ decisions in alien labor certification matters were not considered binding in subsequent cases and the Department had to create a Board of judges specializing in labor certification issues to remedy the problem. Regardless of whether individual ALJ decisions constitute binding precedent for subsequent temporary alien labor certification cases, however, it is generally true that ALJs may be influenced by well-reasoned decisions of other Department ALJs.

> the wage rate which the Director has determined must be offered and paid, as a minimum, to every H-2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H-2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.

20 C.F.R. § 655.100(b).

Regardless of how "wages" are defined in these particular regulations, the fundamental purpose of the regulations is to determine what are the "minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected." 20 C.F.R. § 655.0(a)(2). The wages, terms, benefits, and conditions offered and afforded to the alien must be compared to the "established **minimum** levels." *id.* (emphasis added). "If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels." *Florida Sugar Cane League, Inc. v. Usery* 531 F.2d 299 (5th Cir. 1976) as cited at 20 C.F.R. 655.0(a)(2).

The regulations do not grant authority to the Certifying Officer to impose wage rates or benefit levels on employers that are higher than minimum necessary to avoid adverse affects on similarly employed U.S. workers. Comparing wages paid by an employer who is required to provide free meals and housing to his sheepherders to wages paid by employers who are not so required results in a wage determination of more than the DOL has authority to require.

In the instant case, the provision of meals cannot fairly be characterized as a *de minimis* fringe benefit. On the facts of this case, the sheepherders are actually entitled under the law to meals and housing, in the same manner that they would be entitled to a safe place to work or a minimum wage. As it would be inappropriate to include in a wage survey employees who are not paid minimum wage, it is also inappropriate and inconsistent to require by law that an employer provide meals and housing to his employees on one hand and then on the other hand include in a wage survey used to determine the prevailing wage, employees of employers who are not providing such meals and housing.

The DOL has conceded, in a previous settlement agreement with WRA, that meals have a value of $150 per month per employee. That translates into a cost to the employer of $150 per month per employee. Even without the Director's stipulation in the previous settlement agreement, the value of meals is definable as evidenced by 20 C.F.R. § 655.102(b)(4), which sets the amount an employer may charge an employee for meals when the employer is not otherwise required to provide meals without cost to the employee. According to the Federal Register (Fed. Reg. 7216 February 7, 1995)), the meal charge is currently set at $6.97 per day. To ignore this reality and force employers, as in this case, who are required by law to provide free meals and housing to its employees, to pay wage rates equal to employers who are not so required clearly violates the purpose of the regulations and the Act. Rather than comparing the "wages, terms, benefits, and conditions" to the established "minimum" levels, the DOL's procedures force a

comparison to wages, terms, benefits and conditions somewhere above the minimum levels. This the DOL does not have authority to do, and to do so amounts to an abuse of discretion.

The DOL argues that 20 C.F.R. § 655.93(b) requires it to use a "methodology to establish such adverse wage rates which is consistent with the methodology in § 655.107(a)." According to DOL, since § 655.107(a) states that the AEWRs "shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey," and since the USDA survey states in a footnote that "benefits such as housing and meals are provided some workers but the values are not included in the wage rates," then meals and housing should not be considered in determining the sheepherder AEWR, only monthly cash wages should be considered.

This analysis does not withstand scrutiny. Section 655.107 states that the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the USDA is used for all agricultural employment **"except for those occupations deemed inappropriate under the special circumstances provisions of § 655.93."** Range production of sheep is specifically mentioned as an occupation deemed inappropriate under § 655.93. Under these circumstances, the regulations authorize the Director to establish monthly AEWRs but do not describe how; only that the methodology be consistent with the methodology in § 655.107(a). Since the fundamental purpose of the regulations is to determine what the "minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected," (20 C.F.R. § 655.0(a)(2)), it would be inconsistent and arbitrary to simply replace the hourly rate used in the USDA process with a monthly wage and otherwise interpret § 655.92 to mean that the entire methodology used by USDA must be employed to meet the requirement that the methodology be "consistent." Such interpretation which results only in wages being compared, fails to meet the requirement that the terms, benefits, and conditions offered and afforded to the alien must also be compared to the established minimum levels offered to U.S. workers. 20 C.F.R. § 655.0(a)(2).

There are other problems with the DOL's interpretation of § 655.92. For example, in the U.S.D.A. survey, in a footnote,[6] it is stated that benefits such as housing and meals are provided some workers but the values are not included in the wage rates. What is not stated is of more significance than what is stated. First, housing and meals are characterized by the U.S.D.A. as a benefit. No where is it indicated whether the provision of housing and meals is mandatory as it is for the employer in this case. Second, according to the USDA survey, during October 7-13, 1994, only eight percent of the workers were receiving free meals and only 17 percent were receiving housing. In the prevailing wage report for the instant case, 94 percent of the workers

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[6] In the USDA survey, the footnote is associated with a category entitled "all hired workers." The regulations require that, when appropriate, the AEWR be equal to the annual weighted average hourly wage rate for "field and livestock workers." The category of field and livestock workers does not have an equivalent footnote associated with it. While it may be that the footnote is intended to apply to field and livestock workers, it not entirely clear.

were receiving free housing and 94 percent of the workers were receiving free meals as part of their compensation. These are not insignificant factors and are presumably the reasons why the regulations state that use of the USDA survey figure is "inappropriate" for the sheepherder occupation. Clearly the regulations are attempting to avoid the proverbial comparison of apples and oranges.

A more logical reading of the § 655.92 consistency requirement as applied to sheepherders is that establishing the AEWR must be accomplished by use of the weighted average. This has been accomplished as outlined in the Field Memorandum where in it directs that in most instances, the results of the prevailing wage determination for domestic workers will be used to establish special AEWRs for sheepherders. **The only exception** to this rule will be cases where there is an inadequate sample size. Field Memorandum 74-89, at page 6. In order to provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, "while not deviating from the statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Director has the authority to establish special procedures for processing H-2A applications . . . ." 20 C.F.R. 655.93(b). According to Field Memorandum No. 74-89, dated May 31, 1989, at page 4, the special procedures set forth in the Field Memorandum updates the sheepherder certification guidelines presented in Field Memorandum No. 108-82 and "except as otherwise provided for in these special procedures, the basic H-2A regulations at 20 C.F.R. Part 655, Subpart B, and the operating guidelines in ETA Handbook No. 398 apply to sheepherder and goatherder applications." Field Memorandum 74-89, p. 4. With regard to wages, the Field Memorandum states that employers requesting H-2A certification for sheepherders must offer U.S. and alien workers, as a minimum, the prevailing wage rate for the occupation in the State determined by the state employment security agency prevailing wage survey, verified by the National Office, or a special monthly Adverse Effect Wage Rate (AEWR) established by the National Office, whichever is higher. Prevailing wage surveys "should be performed in accordance with the procedures set forth in the Forms Preparation Handbook, ETA No. 385, pages I-11 through I-143." According to the Field Memorandum at page 6:

> [i]n most instances, the results of the prevailing wage determination for <u>legal</u> domestic workers will be used to establish special AEWRs for sheepherders and for other occupations in the range production of live stock. **The only exception** to this rule will be cases where modification to ETA Handbook No. 385 procedures are necessary to compensate for inadequate sample sizes.

(Underline in original, bold emphasis added).

In this case the state agency found a prevailing wage of $700. The DOL made no mention of an inadequate sample size. From DOL's own memorandum, it follows that DOL should have used the $700 prevailing wage determination to establish the special AEWR. However, DOL did not do this and provided no reason to WRA as to why DOL had determined the AEWR to be $800.

Using subtotaling and line spacing, the state agency grouped separately rates that included housing and meals from rates that only included meals, only included housing, or rates that did not include housing or meals. The state agency stated in the wage report that it utilized the 51 percent rule. It is clear from the way the state agency split up the array that the state agency followed the handbook and considered "housing and meals-no charge" to represent a different "unit of payment" than "meals-no charge," which in turn was different than "housing-no charge" or "no housing or meals." In so doing only the 31 sheepherders who were paid a wage which included meals and housing were combined. In accordance with Handbook No. 385, page I-117, at 3c, the "unit of payment which [was] applicable to the largest number of workers" was determined. Using this unit of payment the prevailing rate was determined in accordance with the 51 percent rule.

This process properly accomplished the goals of the statute and the regulations which require that a determination be made as to what are the "minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected." 20 C.F.R. § 655.0(a)(2). Using this system, the wages, terms, benefits, and conditions offered and afforded to the alien can be properly compared to the "established **minimum** levels" as required by the statute and regulations. *id.* (emphasis added).

The courts have also recognized that wages alone cannot be the only factor considered when determining whether

> the employment of the alien in such labor or services will [] adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188, 20 C.F.R. 655.90(b)(B).

In *Ozbirman v. Regional Manpower Adm'r*, 335 F.Supp 467 (S.D. N.Y. 1971), the exact same language was analyzed by the court as it was used in the permanent alien labor certification program (Section 212(a)(14), 8 U.S.C. § 1182(a)(14)). In *Ozbirman*, as in this case, the Secretary equated a wage below the prevailing rate with an adverse effect on wages and proceeded to deny labor certification solely because the salary offer did not meet the prevailing wage. In doing so, according to the court, "the Secretary effectively failed to recognize or consider that all forms of compensation do not take the form of money." *Id.* at 472. The court went on to state that

> the interrelationship between one's pay rate and other fringe benefits indicates that such an adverse effect would not necessarily occur. The term "adverse effect" is necessarily a box of variables. Shorter hours, unique vacation periods or working conditions, proximity to home and family, and exceptional fringe benefits are all

> factors which influence the labor market and have an effect on wages in this country. The above list doubtless could be expanded, but the point should be clear that an employee can receive exceptional benefits which are not in the form of money and which prevent any adverse effect not withstanding a deficiency in wages. Any determination of an adverse effect on wages should be scrutinized and balanced in light of the variables which enter into a job offer. In this way, the purpose of Congress in protecting the American labor market could be implemented in light of realistic employment factors.

Id. (footnote omitted).

In *Industrial Holographics, Inc. v. Donovan*, 722 F.2d 1362 (7th Cir. 1983), the court agreed with the *Ozbirman* court that "a truly thorough analysis of adverse effects involves factors other than wages." However, the *Donovan* court stated that the Secretary may issue regulations "simplifying the inquiry so that decisions will be less arbitrary and more consistent."

While the courts in the above cases were dealing with the permanent alien labor certification program, the operative language of that statute is identical to the language at issue in the statute in the case at bar. The purpose of the language is the same and there is no logical reason why the analysis would change when applied to the temporary labor certification program. Accordingly, it appears clear that DOL may simplify the process by limiting the types of benefit variables considered for purposes of prevailing wage evaluations. But, it is also equally clear that DOL may not impose a *per se* rule which limits to solely wages its inquiry for purposes of determining AEWR.

The State's breakdown of the array in this case makes it evident that consideration of housing and meals as variables is not difficult in cases involving sheepherders, and that simplification of the inquiry is not needed. The facts of this case perfectly illustrate why oversimplification of a wage analysis is inappropriate.[7] Administrative convenience does not justify a procedure that produces wage rate requirements that are out of line with economic reality.

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[7] The 12.5% difference produced by the calculation methods at issue is a substantial economic burden for the employers in this case. Precision in making prevailing wage calculations may not be a realistic administrative burden for Certifying Officers handling large case loads. The calculation method proposed by the Department in this case, however, is not a realistic reflection of wages paid to sheepherders in the position of alien sheepherders. The Department's explanations for why it believes it must use the array not taking into consideration easily determined differences in remuneration do not illuminate why simplification of the inquiry in this case makes decisions "less arbitrary and more consistent." *Industrial Holographics, supra.*

Order

The Regional Administrator's Order denying certification is REVERSED. The wage rate to be applied for the instant applications shall be the $700.00 per month determined by the California State Employment Security Agency.

JOHN M. VITTONE
Acting Chief Judge

Washington, D.C.
JMV/rpf